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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 139

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF RICHARD REID ROGERS,
Appellant,

vs.

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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SUPREME COURT OF THE UNITED STATES

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No. 139

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF RICHARD REID ROGERS,

Appellant,

against

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellees.

APPEAL FROM THE SUPREME COURT, COUNTY OF ALBANY, STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

MAY IT PLEASE THE COURT:

Now come the appellees in the above entitled cause, by their counsel of record, and move that the appeal herein be dismissed, or that the judgments appealed from be affirmed.

Jurisdiction.

Jurisdiction in this Honorable Court exists only if, in the cause ending in the judgment and final order appealed from, there was drawn into question the validity of a statute of a State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision of the highest Court of the State in which a decision could be had is in favor of the validity of such statute.

Judicial Code, §237(a) [28 U. S. C. § 344 (a)];
45 Stat. 54 [28 U. S. C. § 861 (a)].

It is well settled that, for jurisdiction to exist in this Honorable Court, it must appear affirmatively, not only that a Federal question was presented for decision in the highest State court, but that the decision of such a Federal question was necessary to a determination of the cause, that such Federal question actually was decided, or that the judgment as rendered could not have been given without deciding it.

Williams v. *Oliver,* 53 U. S. 111, 124;
Whitney v. *California,* 274 U. S. 357, 360.

In the instant cause, the decision (R. 136-140)* and opinion (R. 142-174) of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, unquestionably rested upon a consideration of the constitutional immunity from State taxation of agencies or instrumentalities of the Federal government engaged in usual or traditional governmental functions (R. 154). But the affirmance of the New York Court of Appeals was without opinion and, while we may surmise that

* Folio references are to Record in the Court of Appeals.

its decision was based upon the same ground, we are left to conjecture as to the actual basis of its decision.

Lynch v. *New York ex rel. Pierson,* 293 U. S. 52.

In both State courts, there was presented the non-Federal question whether appellant actually was an officer or employee of the Panama Railroad Company, or merely an independent contractor, since the record was silent with respect to his tenure of office, the mode and manner of his appointment, what other professional activities he conducted, whether he engaged in the general practice of law in addition to his duties for the Company or the degree of control over his activities exercised by the Company. Were appellant held to be an independent contractor rather than an officer or employee of the Panama Railroad Company, his compensation would, beyond any question, be subject to State income taxation since he was, concededly, a resident of New York.

Burnet v. *McDonough,* 46 F. (2d) 944;
Metcalf & Eddy v. *Mitchell,* 269 U. S. 514;
Lucas v. *Reed,* 281 U. S. 699;
Commissioner v. *Modjeski,* 75 F. (2d) 468, certiorari denied, 295 U. S. 764.

Candor compels the statement, on our part, that this question was not strenuously urged; nevertheless, the question was presented and, in the absence of any opinion, it is possible that the Court of Appeals affirmance rested thereon rather than upon the question of the constitutional immunity of Federal agencies from State taxation.

State Statute Involved.

This cause involved the application of Article 16 of the Tax Law of the State of New York (Ch. 60 of the Consolidated Laws) which, by § 351, imposes upon every resi-

dent of the State an income tax upon his entire net income at graduated rates. By § 359-f, the salaries, wages and other compensation paid by the United States to its officers and employees is exempted from the application of the tax.

Appellant did not invoke this statutory exemption but rested his claim upon the constitutional doctrine that agencies and instrumentalities of the United States are immune from State taxation (R. 10, 154).

Appellant contended in the courts below, and now contends (Point 7, Statement as to Jurisdiction), that the Panama Rail Road Company is a wholly owned instrumentality of the United States and, hence, exempt from State taxation; and, the Company being so exempt, the salaries paid its officers and employees are likewise so exempt from State taxation.

The Appellate Division upheld the contention of appellees that the real point at issue was whether the Panama Rail Road Company was engaged in the conduct of either an essential or usual governmental function. The Court concluded (R. 170-172):

> "It seems clear to us that the Panama Rail Road Company is a government-controlled corporate agency engaged in a commercial proprietary function. This case must be decided upon the principles laid down in *South Carolina* v. *United States, supra, Ohio* v. *Helvering, supra,* and *Helvering* v. *Powers, supra.* Assuredly, the ownership and operations of stores, hotels and dairies is akin to the operation of liquor stores; and the operation of a steamship line and a railroad comparable to the operation of a street railway. And this particularly where such operation is in continuation and expansion of earlier private, commercial operation. The commercial nature of the functions of the Panama Rail Road Company are further marked by the fact that its operations are profitable and yield dividends to its stockholder, the United States. These operations constitute an activity to which, unquestionably, the

taxing power of the State would normally extend. Under the decision in *Helvering* v. *Powers, supra,* the Federal Government cannot withdraw sources of revenues from a State by engaging in a business which constitutes a departure from usual governmental functions and to which the State's taxing power would normally extend."

As we have indicated, the unanimous determination of the Appellate Division was unanimously affirmed, without opinion, by the Court of Appeals.

Motion to Dismiss or Affirm.

IF A FEDERAL QUESTION IS HERE PRESENTED, IT IS NOT SO SUBSTANTIAL AS TO MERIT REVIEW BY THIS HONORABLE COURT.

The Panama Rail Road Company is a New York corporation created by Chapter 284 of the Laws of 1849 (R. 72). Its entire capital stock (except director's qualifying shares) is owned by the United States, the Secretary of War being stockholder of record (R. 65). It conducts a general transportation business and has its principal place of business at the City of New York (R. 50). There, it has about one hundred office employees, in addition to dock engineers, cargo checkers, freight clerks and passenger agents (R. 53). It operates a line of steamships between New York and the Canal Zone, carrying passengers and cargo (R. 57-58), and its tariffs correspond to those of competing private carriers (R. 61). It also operates a railroad across the Isthmus of Panama, a commissary establishment, a dairy and two hotels (R. 74). The Company has been operating at a profit and has been paying dividends (R. 59). Its employees are paid directly by the Company from moneys derived from its operations (R. 63).

Appellant was employed by the Company as General Counsel at an annual salary of $15,000. In filing resident

income returns for the calendar years 1927, 1928 and 1929, appellant acknowledged receipt of such income, but did not include it as part of his gross income. Assessments for the tax computed thereon were made by the State Tax Commission (R. 40-42).

For a great many years prior to its acquisition by the United States, the Panama Rail Road Company was operated as a private, commercial enterprise and yielded taxes to the State of New York. Thus, in *People ex rel. Western U. Tel. Co.* v. *Roberts*, 30 App. Div. 78, it was said:

> "The Panama Railroad Company is a domestic corporation, organized in 1849, and is subject to the franchise tax imposed by chapter 542 of the laws of 1880, and the acts amendatory thereof or supplemental thereto. Under these laws, prior to 1889, *the company had been assessed and had paid into the state treasury a large amount of taxes.*" (Italics ours.)

The approach of courts familiar with Canal Zone affairs indicates that, in many respects, it continued to be treated as an ordinary private corporation in suits brought by or against it.

Panama Railroad Co. v. *Bosse*, 239 Fed. 303, affirmed 249 U. S. 41;
Panama Railroad Co. v. *Curran*, 256 Fed. 768;
Panama Railroad Co. v. *Minnix*, 282 Fed. 47;
Salas v. *United States*, 234 Fed. 842.

It is well settled that whenever a State engages in business of a private nature, it exercises non-governmental functions and the business, though conducted by the State, is not immune from Federal taxation.

Ohio v. *Helvering*, 292 U. S. 360;
South Carolina v. *United States*, 199 U. S. 437.

And this Honorable Court has held that a State may not withdraw sources of revenue from the Federal taxing

power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the Federal taxing power would normally extend.

Helvering v. *Powers,* 293 U. S. 214.

Appellant seeks to distinguish these cases (Point 8, Statement As to Jurisdiction) by urging that the United States, as a government of delegated powers, has no authority to engage in private business and, therefore, regardless of the nature of the undertaking, if done by the United States, it must be considered as a purely governmental agency, since apparently it is unthinkable that the United States could be "proceeding *ultra vires* and without warrant of law."

We think that contention is without merit and that the activities of the Federal government are to be judged by the same standard as that applied to State undertakings; with respect to the question whether they are classically, usually and traditionally governmental. This Honorable Court has repeatedly held that the immunity from taxation attaching to the usual and traditional governmental functions of either the Federal government or of the States, is mutual and complementary.

Fox Film Corp. v. *Doyal,* 286 U. S. 123, 128;

United States v. *California,* — U. S. —, decided February 3, 1936.

That being so, the decisions of this Honorable Court in *Ohio* v. *Helvering, South Carolina* v. *United States,* and *Helvering* v. *Powers,* are directly in point here and were correctly construed and applied by the State courts.

Finally, the taxation of appellant's salary could not possibly burden, hinder or embarrass the government of the United States for the reason that the United States does not pay him his salary, either directly or even remotely.

His salary is paid from the profitable operations of the Company which, after payment of all expenses, charges and salaries, yield the United States cash dividends. As was held in *Willcutts* v. *Bunn*, 282 U. S. 216, immunity from taxation cannot exist where the taxation is not a direct burden laid upon a governmental instrumentality and where there is only a remote, if any, influence upon the exercise of the functions of government.

Opinions Below.

The opinion of the Appellate Division of the Supreme Court, Third Department, is reported in 245 App. Div. 452 and is set forth in the record (R. 142-174).

No opinion was written by the Court of Appeals. The memorandum decision of that Court is reported in 271 N. Y. mem. 39 and reads as follows:

> "Order affirmed, with costs; no opinion. Concur: Crane, Ch. J., Lehman, O'Brien, Hubbs, Crouch, Loughran and Finch, J. J."

Dated June 16, 1936.

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